Supreme Court, U. S.
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Supreme Court of the United States

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON MC INTYRE, DONALD LISSMAN and BERNARD J. ACH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

For his Petition for Writ of Certiorari, petitioner shows unto the Court:

OFFICIAL AND UNOFFICIAL REPORTS

I. United States District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge; Unreported opinion APPENDIX

II. *Edwin Duba v. W. Don Mc Intyre, Donald Lissman and Bernard J. Ach*, No. 73-1724, Decided July 18, 1974 (8 Cir. 1974) APPENDIX

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JURISDICTION

On July 18, 1974 the United States Court of Appeals for the Eighth Circuit affirmed summary judgment by the United States District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge, in which the Court dismissed an action founded upon due process and equal protection of law and 42 U. S. C. § 1983.

———o———

ISSUES FOR REVIEW

I.

Whether a City Attorney of a Second Class City who executed an Affidavit for Bench Warrant which resulted in an illegal arrest, an illegal incarceration, and an illegal attachment and sale of property, who knew or should have known that the Affidavit failed to charge the commission of an offense made criminal by the laws of Nebraska, has judicial immunity for such act in an action for damages for malicious prosecution and for violation of 42 U. S. C. § 1983.

II.

Whether a Justice of the Peace in Nebraska who issued a Bench Warrant and Order for Attachment in Aid and Execution which resulted in an illegal arrest, an illegal incarceration, and an illegal attachment and sale of property, who knew or should have known that the Affidavit in support thereof failed to charge the commission of an offense made criminal by the laws of Nebraska,

had judicial immunity for such acts in an action for damages for malicious prosecution and for violation of 42 U. S. C. § 1983.

III.

Whether a Chief of Police of a Second Class City in Nebraska who executed a Bench Warrant and an Order for Attachment in Aid and Execution which resulted in an illegal arrest, an illegal incarceration and an illegal attachment and sale of property, who knew or should have known that he had no authority of incarceration under the Bench Warrant, that the Bench Warrant was irregular on its face, and that he had no statutory authority of attachment and execution, has judicial immunity for such acts in an action for false arrest, false imprisonment, malicious prosecution and for violation of 42 U. S. C. § 1983.

IV.

Whether judicial immunity from civil liability is absolute or whether it is a qualified immunity of varying scope, the variation dependent upon the scope of discretion and responsibilities of the Judge and all the circumstances as they reasonably appeared at the time of the action upon which liability was predicated.

V.

Whether judicial immunity from civil liability is a fact question for the Court or for the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

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citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment XIV, Section 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

17 Stat. 13, 42 U. S. C. § 1983.

STATEMENT OF THE CASE

Edwin Duba, petitioner, brought this action for damages for malicious prosecution, false arrest, and violation of 42 U. S. C. § 1983 in the United States District Court for the District of Nebraska. Respondents answered, each alleging, among others, the defense of immunity. Thereafter, each filed separate motions for summary judgment on the grounds of immunity, all of which were sustained individually, and the case was dismissed by the Honorable Richard E. Robinson, Judge, without reported opinion.

At all times pertinent hereto, petitioner Edwin Duba was a resident of Saline County, Nebraska; respondent W.

Don McIntyre was the duly elected, qualified and acting Justice of the Peace for the District of Saline County, Friend, Nebraska, a second class city; respondent Donald Lissman was the duly qualified, appointed and acting Chief of Police of Friend, Nebraska; and respondent Bernard J. Ach was the City Attorney of Friend, Nebraska.

On the 11th day of September 1970 petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska on the 28th, 29th, 30th and 31st days of August 1970 in violation of an Ordinance of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September respondent Bernard J. Ach issued and delivered an Affidavit for Bench Warrant directing and praying Duba's arrest and the attachment of all his hogs to satisfy costs and fine levied on the 11th of September and *for costs and fines in subsequent cases not yet filed.*

Petitioner alleged and respondent Ach denied that the Affidavit for Bench Warrant was issued and delivered under color of state law and without jurisdictional authority.

On the 24th day of September 1970, respondent McIntyre issued a Bench Warrant for the arrest of Duba which recited as probable cause the failure of payment of fine and costs assessed by his court and *for the failure of*

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the payment of fines in subsequent cases not yet filed. Petitioner alleged and respondent McIntyre denied that the warrant was issued under color of state law and without jurisdictional authority.

On the 24th day of September, respondent McIntyre issued an Order of Attachment in Aid and Execution directing the attachment, loading, and sale in his name, all of Duba's hogs for the payment of fines and costs set out above. Petitioner alleged and respondent McIntyre denied that said order was issued under color of state law and without jurisdictional authority.

On the 24th day of September, within one hour, Duba was arrested by respondent Lissman, lodged directly in jail contrary to the order, and 110 of his hogs were attached, loaded and removed to a secret location. On September 25, 1970 the hogs were sold in McIntyre's name out of Saline County in York, Nebraska without bond, inventory or advertisement.

Duba alleged and all respondents denied that at the time of the arrest and attachment all of the respondents knew that the value of the swine greatly exceeded the fine and costs and that the arrest, imprisonment, attachment and sale of said swine constituted a willful and contumacious, malicious prosecution, false arrest, false imprisonment, and violation of petitioner's constitutional civil rights.

Petitioner's deposition shows the fair market value of the hogs to be several thousands of dollars and damages exceeding $40,000.00.

In his answer, McIntyre pled defenses of ignorance, reliance upon respondent Ach, and judicial immunity. Re-

spondent Ach pled affirmative defenses of lack of jurisdiction of the court, statutory authority for his actions, and immunity. Respondent Lissman pled ignorance, reliance upon respondent Ach and good faith as affirmative defenses.

———o———

ARGUMENT

The Circuit Court founded its per curiam opinion on absolute judicial immunity for the Justice of the Peace, and, in turn, derivative immunity for the City Attorney and Police Chief.

Notwithstanding this court's dicta in *Pierson v. Ray*, 386 U. S. 547 (1967) to the effect that common law judicial immunity was not abrogated by 42 U. S. C. § 1983, such immunity cannot be absolute for if it is, then we no longer have a constitutional government in this country but rather a judicial dictatorship.

Fundamental due process and equal protection demand that the judiciary be not above the law in order to prevent another form of the very misuses and abuses of governmental power that this court has concerned itself with in the recent past.

It is one thing to hold that a judge shall be immune from the consequences of his good faith judicial acts and quite another to hold that a judge shall be immune from all consequences of his knowing and intentional deprivation of a person's civil rights. Judicial immunity, in order to prevent a mockery of the 14th Amendment, must of neces-

sity be a qualified immunity of varying scope, the variation dependent upon the scope of discretion and responsibilities of the judicial office and all the circumstances as they reasonably appeared at the time of the action on which liability was predicated—a fact question to be determined by the court or jury after hearing all the evidence. *Scheuer v. Rhodes*, — U. S. —, 40 L. Ed. 90, 94 S. Ct. 1683 (Nos. 72-914 and 72-1318 decided April 17, 1974).

Petitioner respectfully requests Certiorari.

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil 71-L-317

MEMORANDUM
(Filed May 4, 1973)

EDWIN DUBA,

Plaintiff,

vs.

W. DON McINTYRE, DONALD LISSMAN,
and BERNARD J. ACH,

Defendants.

ROBINSON, Senior Judge

THIS MATTER comes before the court upon the motions for summary judgment of defendant, McIntyre (Filing No. 34), defendant Lissman (Filing No. 36) and defendant Ach (Filing No. 38).

Oral arguments have been heard and all parties were given an opportunity to present supporting or opposing evidence. Briefs have been submitted.

The court does not perceive any genuine issue as to any material fact; rather the parties disagree as to the application of the facts to the law governing this action.

The undisputed facts disclose that the plaintiff possessed and raised hogs, and on September 11th, 1970, the plaintiff appeared before Defendant McIntyre (a duly, elected, qualified and acting Justice of the Peace for the

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District of Saline County, Friend, Nebraska), and entered a plea of guilty to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds in violation of an ordinance of the City of Friend, Nebraska.

Defendant McIntyre imposed a fine of $55.00 plus costs in the sum of $4.00, but the plaintiff was released upon the condition that said fine and costs were to be paid within one week. The plaintiff did not pay the fine within the time granted. Defendant, Bernard J. Ach, City Attorney for the City of Friend, Nebraska, executed an affidavit for a Bench Warrant and presented it to defendant McIntyre. On September 24th, 1970, defendant McIntyre then issued a Bench Warrant and an Order for Attachment in aid and execution. Defendant Lissman was the duly qualified, appointed, and acting Chief of Police of Friend, Nebraska. Defendant Lissman executed the Bench Warrant and Order for Attachment in Aid and Execution on September 24th, 1970, and 110 hogs were attached. On September 25th, 1970 hogs were sold in defendant McIntyre's name without bond, inventory, or advertisement. The plaintiff commenced this action pursuant to 42 U. S. C. § 1983 alleging "a willful, contumacious, and malicious false arrest, false imprisonment, wrongful attachment and execution under color of state law and a violation and deprivation of plaintiff's rights, privileges and immunities secured by the Constitution of the United States. (Plaintiff's Amended Complaint—Def. Exhibit No. 1, filing No. 24). Each of the defendants assert immunity as a defense.

The parties agree that the common law rule of Judicial Immunity from liability for damages was not abrogated

by the passage of 42 U. S. C. § 1983. See *Pierson v. Ray*, 386 U. S. 547 (1967).

The plaintiff asserts that the acts in the case were performed in the clear absence of jurisdiction and that there is thus no immunity. As stated in *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962):

> "An exception to the rule of judicial immunity exists which is founded on a distinction between *excess* of jurisdiction and the *absence* of all jurisdiction. . . . Where there is jurisdiction over the subject matter and the person there is immunity, and even though a judge acts in *excess* of his jurisdiction the immunity remains. . . . But where an act is done in the clear *absence* of all jurisdiction and this is known to the judge there is no immunity." (Citations omitted.)

Thus the issue before the Court is whether there was a clear absence of jurisdiction. If upon the agreed facts it can be determined that there was jurisdiction over the subject matter and person, then the defendants could assert immunity even though there was an *excess* of jurisdiction.

If, however, there was a clear *absence* of jurisdiction then the defendants would not be entitled to the defense of immunity.

There is no dispute as to whether there was jurisdiction over the person if there was subject matter jurisdiction, and the issue is thus narrowed as to whether there was sufficient jurisdiction over the subject matter such that the doctrine of immunity may be properly applied.

The plaintiff initially argues that there is a factual issue as to the validity of the Friend Ordinance in question. In support of the motion for summary judgment, however,

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an affidavit was filed and received. (Def. Exhibit No. 7 —Filing No. 35). According to this affidavit the ordinance was in full force and effect. The plaintiff neither offered any item in rebuttal nor even advanced any specific reason or legal theory as to why the ordinance might have been defective.

As stated in *Jennings v. Davis*, No. 72-1590, (4/20/73 8th Cir.):

> "(A)pellants could not then rest upon the mere allegations of their pleadings, but should have 'set forth specific facts showing that there is a genuine issue for trial'. See Rule 56(e)."

Moreover any potential defect in the ordinance may have been waived by the plea of guilty. The lack of even a theory by the plaintiff precludes any definitive determination on the basis of waiver.

The court must look at the pertinent Nebraska law which defines the jurisdiction of a Justice of the Peace. Neb. Rev. Stat. § 27-102 (Reissue 1964) provides:

> "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed two hundred dollars, except in cases limited in this Chapter."

Neb. Rev. Stat. 27-105 (Reissue 1964) does not limit jurisdiction in this case nor has any other limitation of Chapter 27 been noted by the court.

Neb. Rev. Stat. § 17-547 (Reissue 1970) provides:

> "Second class cities and villages shall have power to regulate the running at large of cattle, hogs, horses, mules, sheep, goats, dogs, and other animals, and to cause such as may be running at large to be impounded

> and sold to discharge the cost and penalties provided for the violation of such prohibitions and the expense of impounding and keeping the same and of such sale."

Friend is a second class city, and, as previously noted, an ordinance to regulate the running at large of various animals was in force.

Neb. Rev. Stat. § 17-564 (Reissue 1970) further provides a method for enforcement of city ordinances:

> "Fines may in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state."

Neb. Rev. Stat. § 27-1601 (Reissue 1964) provides:

> "Execution for the enforcement of a judgment before a justice of the peace, . . . , may issue by the justice before whom the judgment was rendered . . ."

and Neb. Rev. Stat. § 27-1602 (Reissue 1964) provides:

> "It shall be the duty of the Justice, if the case is not appealed, . . . , at the expiration of ten days from the entry of the judgment, to issue execution, without a demand, and proceed to collect the judgment . . ."

Cleaver v. Jenkins, 84 Neb. 565, 121 N. W. 992 (1909), specifically cited § 1048 of the Civil Code (which is a source of Neb. Rev. Stat. § 27-1602 (Reissue 1964)) in holding that a city police judge had authority to issue executions to recover fines imposed for a violation of an ordinance. Since the statutory provision explicitly refers to justices of the peace it clearly follows that the holding of *Cleaver, supra*, would also pertain to justices of the peace.

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The plaintiff argues that there is no authority to enforce the ordinance by imprisonment until the execution was returned unsatisfied.

Neb. Rev. Stat. § 29-2404 (Reissue of 1964) provides:

> "In all cases of misdemeanor in which courts or magistrates shall have power to fine any offender, and shall render judgment for such fine, it shall be lawful to issue executions for the same, with the costs taxed against the offender, to be levied on the goods and chattels of any such offender, and, for want of the same, upon the body of the offender, who shall thereupon be committed to the jail of the proper county until the fine and costs be paid, or secured to be paid, or the offender be otherwise discharged according to law."

See *State v. Swedland*, 114 Neb. 280, 207 N. W. 29 (1926).

The Bench Warrant provides in part that:

> "The defendant entered a plea of guilty and was convicted and was fined the sum of $55.00 and assessed the costs in the amount of $4.00; that the defendant was unable to pay the same; that the defendant was thereupon released upon the condition that he would pay the fine and costs within one week; that the defendant has failed, refused and neglected to pay the fine and costs; that a Bench Warrant should be issued for the defendant's arrest and for notification upon him that all hogs owned by him within the City Limits of the City of Friend would be attached, seized and sold at public auction to the highest bidder for cash in order to satisfy the fine and costs herein as well as the fine and costs in subsequent cases filed for the same offense."
>
> "These are, therefore, to command you forthwith to take the said Edwin Duba into custody and bring his

body before me for entry of an order of attachment of all his hogs in the City of Friend to be sold at public auction to the highest bidder for cash in order to satisfy the unpaid fines and costs herein as well as in other subsequent cases for the same offense. (Defendant's Exhibit No. 3)."

The undisputed facts disclose that the plaintiff was taken into custody for approximately an hour and a half shortly after noon on September 24th, 1970 (Defendant's Exhibit 8—pgs. 27-29—this is labeled erroneously as "Defendant's" Exhibit but was offered only by the plaintiff and it is treated as plaintiff's exhibit).

Then defendant McIntyre (in company with defendant Lissman) arrived at the jail and the plaintiff was released.

It is clear from the language of the Bench Warrant that the purpose was to aid in the execution and attachment and not to commit the plaintiff to jail until the fine and costs were paid, and the plaintiff's own evidence confirms that the purpose was *not* to commit the plaintiff to jail until the fine and costs were paid (Defendant's (plaintiff's) Exhibit 8, pgs. 29-31). Other language relating to future fines and costs goes to an excess of jurisdiction and is superfluous with respect to this action because there is no contention that any money was held for future fines and costs.

The court finds, upon the undisputed facts, that under the pertinent Nebraska law there was jurisdiction over the subject matter, and that notwithstanding acts done in an excess of jurisdiction the defendants are entitled to assert the defense of immunity.

Under the sweeping immunity provided judges it is apparent that summary judgment should be granted for

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Justice of the Peace McIntyre. See *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962).

Under the undisputed facts of this action it is clear that the defendant Ach was performing acts in connection with judicial duties (as opposed to investigatory duties) and is entitled to "quasi-judicial" immunity. See *Rhodes v. Houston, supra; Skinner v. Grimminger*, Civil No. 72-L-247 (D. Neb. 11/20/72) and *Wilhelm v. Turner*, 431 F. 2d 117 (8th Cir. 1970).

The court holds that summary judgment dismissing the action against defendant Ach is proper.

The defendants should not interpret the shield of immunity as for their protection or benefit. As stated in *Pierson v. Ray, supra*, at 554, it is

> "(F)or the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

In order to benefit the public fully it is important to exercise good judgment.

The court notes that the Nebraska Unicameral repealed Chapter 27 of the Neb. Rev. Statutes and abolished the Justice of the Peace Courts. See Neb. Rev. Stat. (1972 C. S.).

A separate order granting summary judgment for the defendants and dismissing this action will be entered.

Dated this 4th day of May, 1973.

Civil 71-L-817

ORDER

(Filed May 4, 1973)

THIS ACTION came on for hearing before the court and the issues having been duly heard and a Memorandum decision having been duly rendered,

IT IS ORDERED that the motions of defendant McIntyre, defendant Ach and defendant Lissman should be and are hereby granted and sustained.

IT IS FURTHER ORDERED that the plaintiff Duba take nothing, and that the action be dismissed on the merits.

Dated this 4th day of May, 1973.

BY THE COURT:
Richard E. Robinson
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—o—

No. 73-1724

—o—

Edwin Duba,

Appellant,

vs.

W. Don McIntyre, Donald Lissman and Bernard J. Ach,

Appellees.

—o—

Appeal from the United States District Court
for the District of Nebraska.

—o—

Submitted: March 15, 1974.

—o—

Filed: July 18, 1974.

—o—

Before GIBSON, BRIGHT and STEPHENSON,
Circuit Judges.

PER CURIAM.

Appellant-Duba brought this damage action for malicious prosecution, false arrest, and violation of 42 U. S. C. § 1983 in the United States District Court for the District of Nebraska (Senior District Judge Richard E. Robinson, presiding). Appellees, who are officials of Friend, Nebraska—Justice of the Peace W. Don McIntyre, City Attorney Bernard J. Ach, and Chief of Police Donald Lissman—moved for summary judgment on the grounds of judicial immunity. In an unreported opinion, Judge Robinson sustained the motions and dismissed the case.

The fundament of appellant's complaint is that appellees maliciously destroyed his business and violated his constitutional rights by attaching and selling off his entire stock of hogs, valued at several thousand dollars, on the pretense of satisfying a $55 misdemeanor fine. The underlying facts appear to be that on September 11, 1970, Duba entered a plea of guilty before Justice of the Peace McIntyre on a charge of unlawfully permitting some of his hogs to run at large upon the streets of the City of Friend, Nebraska; he was released on the condition that the $55 fine plus $4 costs be paid within one week. On September 24, 1970, City Attorney Ach issued and delivered to appellee-McIntyre an affidavit for a bench warrant, directing Duba's arrest and the attachment of all of his hogs "in order to satisfy the fine and costs herein as well as the fine and costs in subsequent cases filed for the same offense." The bench warrant was issued forthwith, Duba was arrested and detained for about one hour, and 110 of his hogs were attached, loaded, and removed to an auction barn in York, Nebraska, where they were

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sold the following day without bond, inventory, or advertisement.

In answer, appellees raise the defense of judicial immunity for the justice of the peace and, in turn, derivative immunity for the prosecutor and quasi-judicial immunity for the police chief. Judge Robinson concluded:

> The Court finds, upon the undisputed facts, that under the pertinent Nebraska law there was jurisdiction over the subject matter, and that notwithstanding acts done in an excess of jurisdiction the defendants are entitled to assert the defense of immunity.

The sole issue on this appeal is whether the doctrine of judicial immunity was properly invoked to shield the conduct of the appellees in this case. We hold that it was.

As the district court correctly noted, the common law rule of judicial immunity from liability for damages was not abrogated by the passage of 42 U. S. C. § 1983, *Pierson v. Ray,* 386 U. S. 547 (1967), and that immunity is absolute even though the judge may act in excess of his jurisdiction and with malice. *Id.* at 554. As a judicial officer, a justice of the peace has the benefit of this immunity. *Stift v. Lynch,* 267 F. 2d 237 (7th Cir. 1959). A derivative form of immunity exists for prosecutors who will be cloaked with the same immunity granted to judges when they are acting within the scope of their proper prosecutorial capacity, rather than in an investigatory capacity. *Barnes v. Dorsey,* 480 F. 2d 1057, 1060 (8th Cir. 1973). *See Wilhelm v. Turner,* 431 F. 2d 177 (8th Cir. 1970); *cert. denied,* 401 U. S. 947 (1971). A quasi-judicial form of immunity is extended to police and other court officers for purely ministerial acts where they do nothing other than perform orders issuing from a court. *Rhodes v. Houston,*

202 F. Supp. 624, 636 (D. Neb.), *aff'd* 309 F. 2d 959 (8th Cir. 1962) (citing cases). The question therefore is whether the appellees were acting within the scope of their jurisdiction under Nebraska law.

The leading cases which we must turn to for guidance in determining whether the complained-of acts were done in the "absence" of jurisdiction or merely in "excess" of jurisdiction are *Bradley v. Fisher*, 80 U. S. 335 (1871); *Manning v. Ketcham*, 58 F. 2d 948 (6th Cir. 1932); and *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S. D. Ohio 1971). *Cf. Jacobson v. Schaefer*, 441 F. 2d 127 (7th Cir. 1971). These cases instruct that the motivation of the judge is no test of his jurisdiction, and that malice goes only to aggravation of damages and that honesty of purpose goes only to mitigation. *Manning v. Ketcham* at 949. A useful test has been suggested in *Wade v. Bethesda Hospital*, where the court said:

> We begin by defining the concept of jurisdiction as it is used in the context of judicial immunity. The cases are clear that the term jurisdiction means that the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit for an act performed in his judicial capacity. See, Thompson v. Heither, 235 F. 2d 177 (6th Cir. 1956) and cases cited therein; Ryan v. Scoggin, 245 F. 2d 54 (10th Cir. 1957). A third element, however, also enters into the concept of jurisdiction as used in this context. The third element is the power of the Court to render the particular decision which was given. See, Cooper v. Reynolds, 77 U. S. 308, 316, 10 Wall. 308, 19 L. Ed. 931 (1870); National Malleable & Steel Castings Co. v. Goodlet, 195 F. 2d 8 (7th Cir. 1952); City of Phoenix v. Greer, 43 Ariz. 214, 29 P. 2d 1062 (1934).

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> A judge will not lose his immunity because of a mere error in judgment even though the resultant act be in excess of the Court's jurisdiction. Ryan v. Scoggin, *supra*; O'Bryan v. Chandler, 352 F. 2d 987 (10th Cir. 1965) cert. den. 384 U. S. 926, 86 S. Ct. 1444, 16 L. Ed. 2d 530, rehearing den. 385 U. S. 889, 87 S. Ct. 13, 17 L. Ed. 2d 123. "Excess of jurisdiction" as distinguished from entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked. Pogue v. Swink, 365 Mo. 503, 284 S. W. 2d 868 (1955).
>
> Consequently, the third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendant's action is authorized by any set of conditions or circumstances. [337 F. Supp. at 673.]

In essence, Judge Robinson used this test to examine appellant's allegations in light of Nebraska law which clearly authorizes judicial officers including justices of the peace to issue executions to recover fines imposed for violation of municipal ordinances. *See* Neb. Rev. Stat. § 17-564 (Reissue 1970); § 27-1601 (Reissue 1964). *Cf. Cleaver v. Jenkins*, 121 N. W. 992 (Neb. 1909). Judge Robinson concluded:

> It is clear from the language of the Bench Warrant that the purpose was to aid in the execution and attachment and not to commit the plaintiff to jail until the fine and costs were paid, and the plaintiff's own evidence confirms that the purpose was *not* to commit the plaintiff to jail until the fine and costs were paid (Defendant's (plaintiff's) Exhibit 8, pgs. 29-31). Other language relating to future fines and costs goes to an excess of jurisdiction and is superfluous with respect to this action because there is no contention that any money was held for future fines and costs.

We think that Judge Robinson was correct in holding that appellees' conduct, even though in excess of their jurisdiction, was within their general powers under Nebraska law and therefore cloaked with immunity for the purpose of a civil rights action under § 1983.[1] We also approve Judge Robinson's wise *caveat* regarding judicial immunity:

> The defendants should not interpret the shield of immunity as for their protection or benefit. As stated in *Pierson v. Ray, supra,* at 554, it is
>
> "(F)or the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."
>
> In order to benefit the public fully it is important to exercise good judgment.

See Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

Affirmed.

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Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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1 This opinion, limited to recognizing the applicability under § 1983 of the common law rule of immunity for the defendants in this case, offers no view on whether plaintiff would have a common law action under Nebraska law in **indebitatus assumpsit,** and possible damages against the state for the recovery back of a fine which allegedly has been illegally collected. If Nebraska recognizes such an action in **indebitatus assumpsit,** Nebraska state courts provide the proper forum.

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